



**38 CFR Part 3**

**RIN 2900-AR40**

**Awards Under the Nehmer Court Orders for Disability or Death Caused by a Condition Presumptively Associated with Herbicide Exposure; Implementing Court Order.**

**AGENCY:** Department of Veterans Affairs

**ACTION:** Final rule

**SUMMARY:** The Department of Veterans Affairs (VA) is issuing this final rule to amend its regulation regarding the process for identifying and paying appropriate payees entitled to retroactive benefits. This amendment is necessary to implement a federal district court order directing the VA to remove certain regulatory text concerning subsequent release of compensation to a payee when the full amount of unpaid benefits has previously been released.

**DATES:** Effective date: This final rule is effective [insert date of publication in the FEDERAL REGISTER].

Applicability date: The provisions of this final rule shall apply to circumstances in which VA has received information about a newly identified and eligible payee (hereafter “new payee”) who has yet to receive the *Nehmer*-related benefits to which the new payee is entitled.

**FOR FURTHER INFORMATION CONTACT:** Christopher O. Adeloye, Staff Attorney, Benefits Law Group, Office of General Counsel (022), 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-7662. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:**

## I. Background and Basis for Revision of Regulation

In 1991, as part of the *Nehmer* litigation (*Nehmer v. U.S. Department of Veterans Affairs*, 712 F.Supp. 1404 (N.D. Cal. May 3, 1989)) before the U.S. District Court for the Northern District of California, the parties entered into a consent decree that required VA to readjudicate claims filed by a specific class of veterans who served in the Republic of Vietnam. In the event that VA's readjudication of a veteran's claim was favorable, VA would make payment of any past-due benefits to the veteran. However, as clarified by a subsequent court order, if VA's readjudication of a veteran's claim was favorable but the veteran was deceased, VA would pay the full amount of any past-due benefits to the first individual or entity listed, in this order: 1) the veteran's spouse; 2) the veteran's children in equal shares; 3) the veteran's parents in equal shares; and 4) the veteran's estate.

On September 17, 2021, the plaintiffs in *Nehmer* filed a motion with the district court in which they sought to enforce the consent decree. As part of their motion, the plaintiffs requested that the court issue an order requiring VA to rescind the last sentence in section 3.816(f)(3): "If, following such efforts, VA releases the full amount of unpaid benefits to a payee, VA may not thereafter pay any portion of such benefits to any other individual, unless VA is able to recover the payment previously released."

On November 10, 2021, the court issued an order (*Nehmer v. U.S. Department of Veterans Affairs*, No. C86-06160 WHA, USDC N. District California, November 10, 2021) vacating the final sentence of section 3.816(f)(3), directing VA to issue a rule rescinding that sentence, and requiring VA to publish that rule in the Federal Register. Consistent with that order, VA is issuing this rulemaking to remove the final sentence from section 3.816(f)(3).

## Administrative Procedure Act

The Secretary of Veterans Affairs finds that there is good cause under the provisions of 5 U.S.C. 553(b)(B) and (d)(3) to publish this rule without prior opportunity for public comment and with an immediate effective date. The good cause exception allows an agency to forego public notice and comment where it would be “impracticable, unnecessary, or contrary to the public interest.” See 5 U.S.C. 553(b)(B). Similarly, under 5 U.S.C. 553(d)(3), an agency may forego the requirement for a delayed effective date “for good cause found and published with the rule.” This amendment to section 3.816(f)(3) is ministerial in that it simply implements the court’s November 10, 2021, order. Furthermore, delay in publication of this notice could lead to confusion among the public, particularly among new payees who may otherwise lack notice that the final sentence in section 3.816(f)(3) has been vacated. As the court noted in its order, this presents a “serious risk” to certain payees who may otherwise believe they are not entitled to their share of a *Nehmer* award. For these reasons, notice and comment and a delayed effective date are unnecessary, impracticable, and contrary to the public interest, and, consequently, VA has good cause under the Administrative Procedure Act to publish this rule without prior opportunity for public comment and with an immediate effective date.

## Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and

benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at [www.regulations.gov](http://www.regulations.gov).

#### Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

#### Assistance Listing

The Assistance Listing program numbers and titles for this rule are 64.104 Pension for Non-Service-Connected Disability for Veterans; 64.105 Pension to Veterans Surviving Spouses, and Children; 64.109 Veterans Compensation for Service-

Connected Disability; 64.110 Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

## List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Veterans.

### Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on November 24, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Jeffrey M. Martin,**

*Assistant Director,*

*Office of Regulation Policy & Management,*

*Office of General Counsel,*

*Department of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

### PART 3 – ADJUDICATION

#### Subpart A—Special Benefits

1. The authority citation for part 3, subpart A continues to read as follows:  
Authority: 38 U.S.C. 501.

#### § 3.816 [Amended]

2. Amend § 3.816 by removing the last sentence in paragraph (f)(3).